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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1950

No. 388

JACK B. TENNEY, THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES (a California Legislative Committee), HUGH M. BURNS, NELSON S. DILWORTH, FRED H. KRAFT, LOUIS G. SUTTON and CLYDE A. WATSON,

Petitioners,

vs.

WILLIAM PATRICK BRANDHOVE,

Respondent.

WILLIAM PATRICK BRANDHOVE,

Cross-Petitioner,

vs.

ELMER E. ROBINSON,

Cross-Respondent.

ANSWER TO CROSS-PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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to the United States Court of Appeals
for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

STATEMENT OF CASE.

Cross-petitioner William Patrick Brandhove filed a complaint in the United States District Court in San Francisco praying for $250,000 damages against all of the members of the Un-American Activities Committee of the California State Senate and cross-respondent Elmer E. Robinson. The complaint is based on an alleged conspiracy to deprive cross-petitioner of his civil rights.

The United States District Court dismissed the complaint as to all defendants, on appeal to the Circuit Court of Appeals for the 9th District the judgment of dismissal was affirmed as to cross-respondent Elmer E. Robinson and reversed as to the other defendants.

The other defendants have petitioned this Court for a writ of certiorari to the Circuit Court of Appeals and respondent therein has filed a cross-petition for a writ of certiorari to the same Circuit Court of Appeals in connection with its affirmance of the dismissal of the complaint as to this cross-respondent Elmer E. Robinson.

STATEMENT OF FACTS.

Briefly summarized, the complaint, with its exhibits, stripped of argument and conclusions, alleges:

That on January 28, 1949, cross-petitioner William Patrick Brandhove was circulating an unsworn petition among the California State Legislators which accused the Tenney Un-American Activities Committee of the State Legislature of using him as an instrument to smear Franck R. Havenner as a candidate for mayor in 1946, implicating cross-respondent Elmer E. Robinson, Mayor of San Francisco, and asserting that no further appropriations should be made to the Committee for their work (Complaint paragraph 3, lines 4-5); that from the exhibits attached to the complaint, it appears that this petition stated facts contrary to a sworn affidavit previously made in San Francisco by Brandhove (R. pp. 23 and 24, Exh. D, to complaint and R. pp. 42 and 43), and contrary to Brandhove's sworn testimony given in Oakland, Alameda County, before the Tenney Committee on a previous occasion. (R. p. 25, Exh. E to complaint.) The complaint further alleges that Tenney telegraphed the District Attorneys of San Francisco and Alameda requesting perjury action against appellant because of the statements' variance with his sworn testimony (R. p. 6); that Tenney advised Elmer E. Robinson by telephone of the charges in the Brandhove petition and that ways to thwart Brandhove were discussed and that it was agreed to hold a meeting of the Un-American Activities Committee, and that Robinson would appear as a witness to deny the Brandhove charges so far as they applied to Robinson (R. p. 5); that a subpoena was served on cross-petitioner to appear before the Tenney Committee on January 29, 1949, at 3:00 o'clock P.M.

(R. p. 5) (the Legislature had recessed on January 29, 1949 at 3:00 o'clock P.M.); that cross-petitioner Brandhove and his counsel appeared, as did cross-respondent Elmer E. Robinson; that Robinson made a statement and then testified under oath concerning the matters charged in cross-petitioner's petition to the legislature (R. p. 7); that cross-petitioner was sworn, but refused to testify, and was charged with a misdemeanor under Section 9412 of the California Government Code for refusing to testify (R. p. 8); that he was tried and, after a disagreement (11 to 1 for acquittal) the complaint was dismissed (R. p. 9); the complaint further alleges that the defendants with malice and intent to deter and intimidate cross-petitioner and effectively prevent him from exercising his right of free speech and to petition the California State Legislature did the acts complained of and that cross-respondent Elmer E. Robinson, conspired with all the other defendants in the manner set forth in the complaint (R. p. 10.)

Aside from the foregoing, the complaint is replete with accusations, conclusions and arguments.

ARGUMENT.

DISMISSAL OF COMPLAINT WAS PROPER.

The District Court's action (affirmed by the 9th Circuit Court of Appeals), in dismissing the complaint as to cross-respondent Elmer E. Robinson was correct and the cross-petition for writ of certiorari should be denied for three reasons:

1. The complaint fails to allege any facts showing that Elmer E. Robinson committed any wrongful act.

2. The Federal Court had no jurisdiction of the action.

3. In any event, Elmer E. Robinson, as a private citizen, not acting under color of State Authority, is not subject to suit under the statutes cited.

I.

COMPLAINT FAILS TO ALLEGE COMMISSION OF WRONGFUL ACT.

The complaint fails to allege any facts showing that Elmer E. Robinson committed any wrongful act. Aside from the legal obstacles to cross-petitioner's position, it is elementary that the complaint must allege the commission of some wrongful act or acts by cross-respondent Elmer E. Robinson and damage to the cross-petitioner.

Cross-petitioner's theory seems to be that Elmer E. Robinson conspired with defendant Tenney to cross-petitioner's damage, because Robinson received a telephone call from Tenney advising him of the charges in Brandhove's petition and that Robinson and Tenney discussed the matter, and the best means to thwart cross-petitioner Brandhove's charges, and it was agreed to have a committee hearing of the Tenney Committee, where cross-respondent Elmer E. Robinson would appear. It is not alleged nor contended that Elmer E. Robinson could call a meeting of the committee. Hence, the net result of Brandhove's

allegations in this regard is that Elmer E. Robinson agreed to appear before the committee to testify as to the charges made against himself and the committee. In sum, this is all that is or can be charged against Elmer E. Robinson, other than the fact that he appeared, made an unsworn statement and then testified.

Cross-petitioner's complaint is that because cross-respondent Elmer E. Robinson exercised his right of free speech, he, Brandhove, was injured by Robinson's denial, under oath, of cross-petitioner's unsworn charges, which appear from his complaint to be contrary to his previous sworn testimony. Such a position is inconsistent, to say the least, but is no more inconsistent than the many other well-known attacks on the Un-American Activities Committee of the various States and Congress.

Cross-petitioner demands damages because of his claim that his right to petition the California Legislature was impaired.

From a purely factual standpoint, cross-respondent Elmer E. Robinson contends that cross-petitioner has failed to allege facts showing any interference with (a) his right of free speech, or (b) his right to petition the California Legislature. Cross-petitioner has failed to sustain the burden of showing how anything done by Elmer E. Robinson was wrongful or damaging to him, and hence, it is submitted that the complaint was properly dismissed as to cross-respondent Elmer E. Robinson on the ground that no facts are alleged that competently charge him with a wrongful

act. In a civil action for damages under Sections 43 and 47 of Title 8 U.S.C.A., the action is based on the wrong or wrongs perpetrated by the defendant or defendants. There is no cause of action for a civil conspiracy as such. This question was thoroughly discussed in *Moffett v. Commerce Trust Co.*, 75 F. Supp. 303. In that case, the plaintiff sued several persons for damage resulting from a conspiracy which deprived her of due process of law and equal protection of the law. She based her action on Sections 43 and 47 of Title 8 U.S.C. The action was dismissed and the Court said:

> "This being an action for a civil wrong wrought under an alleged conspiracy, it must not be forgotten that the gist or gravamen of the action is not the conspiracy itself but the civil wrong done under the conspiracy and which wrong or wrongs resulted in damage to plaintiff."

and,

> "It is the rule, therefore, that each tortious act resulting in damage creates an independent, separate and distinct cause of action against the conspirators.
>
> "An inspection of plaintiff's amended complaint shows that it contains many alleged tortious acts. These are not separated but are incorporated in one complaint as if there was a single cause of action, and, at the conclusion of the complaint covering 83 typewritten pages, plaintiff prays damages as above set out. The complaint partakes of the nature of a Federal indictment in the case of a criminal conspiracy and the alleged tortious acts are treated merely as overt acts. This, of

> course, cannot be done under the Federal rules of Civil Procedure. 28 USCA following Section 723C."

See also Vol. 15, Corpus Juris Secundum, Conspiracy, Section 21.

From a careful reading of cross-petitioner's complaint in our case, we must conclude that he fails to allege a single wrongful act committed by cross-respondent Elmer E. Robinson, and further fails to allege how any act of said cross-respondent caused him or his property any damage.

In *U.S. v. Josephson,* 165 F. (2d) 82, the Court, in affirming the conviction of defendant for refusing to testify before the Congressional Un-American Activities Committee said:

> "Thus, the only real basis for the appellant's contention seems to be that in some way the First Amendment in protecting freedom of speech guarantees such privacy in speaking as the particular speaker may desire, and that this privacy is violated by whatever disclosure occurs incidental to an investigation for legislative purposes. This is a fallacy essentially based upon the idea that the Constitution protests timidity."

Paraphrasing the foregoing quotation, we may say that the cross-petitioner contends that the 14th Amendment somehow protects him and his utterances from criticism and enjoins silence on those he selects for his criticism, and no one should be permitted to answer his accusations.

Furthermore, the only action that cross-respondent Elmer E. Robinson could have conspired to do was to agree to attend a committee meeting at which he would testify to the falsity of the Brandhove charges. He is not charged with conspiring to charge Brandhove with criminal contempt and then trying him. Such would be impossible because if Brandhove had answered the questions submitted to him by the committee no further proceedings would be in order and the matter would have been ended, if he testified to the truth. If Brandhove is correct, no citizen would be safe in taking the stand in a hearing before a Legislative Committee without subjecting himself to the charge of violating the civil rights of one with whom he disagrees. This must be the logical result of the Brandhove contentions. If Brandhove makes a public statement accusing a citizen and a Legislative Committee of joining together in the commission of improper acts, is the citizen foreclosed from appearing before the committee and testifying that the charges are false? This cross-respondent believes freedom of speech means freedom to all.

Therefore, it is submitted that on a purely factual basis, the complaint was properly dismissed for failing to allege the commission of any wrongful acts by cross-respondent Elmer E. Robinson, or for that matter by any other person.

II.

THE FEDERAL COURT HAD NO JURISDICTION OF THE ACTION, AND THE ACTIONS OF THE CALIFORNIA STATE SENATE UN-AMERICAN ACTIVITIES COMMITTEE WERE LAWFUL AND NOT SUBJECT TO ENQUIRY BY THE COURTS.

In a petition to this Court the members of the Un-American Activities Committee of the California State Senate have asked that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to the end that upon a review of the case the judgment of said Circuit Court be reversed, thereby affirming the District Court's action in dismissing the complaint.

Unless the actions of the committee and its members resulted in an actionable wrong for which Sections 43 and 47 of Title 8 U.S.C.A. afford relief the complaint of cross-petitioner Brandhove must fall as to all defendants, including cross-respondent Elmer E. Robinson, who is charged with conspiring with the other defendants.

In discussing the legal obstacles to cross-petitioner's action in the Federal Court, we must assume that his freedom of speech and right to petition the California Legislature was interfered with or obstructed.

Cross-petitioner bases jurisdiction on Sections 43 and 47 of Title 8 U.S.C.A. These statutes were adopted as enabling acts to the 14th and 15th Amendments to the United States Constitution, and hence, the scope of their application is limited by the scope of the amendments.

United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588.

In the first place, it seems clear that the right to petition the California Legislature is not a right protected by the 14th and 15th Amendments. In *Snowden v. Hughes,* 321 U.S. 1, 88 L. Ed. 497, it was held that right to be a candidate to a State office is not protected by the 14th Amendment.

Other rights not protected by the 14th Amendment from State action are:

Right to trial by jury in a State Court.
Tompsett v. Ohio, 146 Fed. (2d) 95.

Freedom from unreasonable searches and seizures.
United States v. Crosby, 1 Hughes 448, Fed. Case No. 14,893.

Right to indictment by Grand Jury.
Maxwell v. Dow, 176 U.S. 581.

Prohibition against self-incrimination.
Adamson v. California, 332 U.S. 46.

Right to be charged by indictment in felony cases.
Hurtado v. California, 110 U.S. 516.

In *Hardyman v. Collins,* 80 F. Supp. 501, we find an excellent discussion of the difference between rights protected by the 14th Amendment and those that are personal and come under solely State jurisdiction.

Thus, if any right protected by the 14th and 15th Amendments was violated, it was cross-petitioner's right to freedom of speech. This right is protected from State action by the "due process" clause of the 14th Amendment.

Douglas v. Jeannette, 319 U.S. 15, 87 L. Ed. 1324.

The law is clear that Section 43 of Title 8 U.S.C.A. applies to protection against violation of due process of law, and Section 47 of Title 8 U.S.C.A. (conspiracy section) applies only to denial of equal protection of the laws. In a case footnote to *McShane v. Moldovan,* 172 F. (2d) 1016, the Court said:

> "Sections 43 and 47 grant separate and distinct rights of action. Section 43 gives a cause of action for denial of due process of law; and Section 47, for denial of equal protection of the laws. See Mitchell v. Greenough, 9 Cir., 100 F. (2d) 184; Bottone v. Lindsay, 10 Cir., 170 F. (2d) 705."

In *Mitchell v. Greenough,* 100 F. (2d) 184, this distinction is discussed. The action under civil rights statutes for damages for conspiracy to deprive plaintiff of right to practice law through a conviction by use of perjured testimony. Section 47 was the basis of plaintiff's complaint, and was held not applicable because it related to equal protection of the laws, which is not the same as due process of law.

> "The prohibition against denial of the equal protection of the law was to prevent class legislation or action."

> "The question then is whether or not a conspiracy to secure a conviction of a criminal offense in a Court having jurisdiction thereof and of the defendant knowingly using perjured testimony to convict an innocent person, is a conspiracy for the purpose of impending the due course of justice in an attempt to deny to any citizen the equal protection of the laws. It is only in case of a conspiracy to effectuate such a purpose that one

damaged in his person or property, or deprived of his rights as a citizen of the United States, is entitled to maintain an action for damages in the Federal Courts under the Statute."

"No such purpose was involved in the alleged conspiracy in the case at bar. Appellant was subjected to no greater hazard of being prosecuted for a crime and convicted by false testimony * * *."

Thus, if appellant in our case has a cause of action, it must be based on Section 43 of Title 8 U.S.C.A., which states:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 47 does not apply, hence the allegations of conspiracy must be disregarded as surplusage and the acts of each individual defendant must be examined to determine if any one of them committed an act damaging cross-petitioner as defined in Section 43, Title 8, U.S.C.A.

It is submitted that everything that any defendant did was lawful and did not interfere with appellant's freedom of speech.

The Courts will not inquire into the propriety of the resolution creating the State Un-American Activities Committee and will accept the declaration in the creating resolution that the information is sought for legislative purpose. *United States v. Josephson,* 165 F. (2d) 82; *Barsky v. United States,* 167 F. (2d) 241. Hence, everything done by the committee was lawful and proper and while it may have inconvenienced appellant to appear, so would it inconvenience any citizen to appear before the committee to testify, or so it does inconvenience every witness called to testify in court.

This phase of the case is more completely covered by the brief of the petitioning members of the Un-American Activities Committee and this cross-petition concurs in their position. Obviously, if no cause of action is stated as to the members of the committee, then none is stated as to cross-respondent Elmer E. Robinson.

Wherefore, it is submitted that the complaint was properly dismissed on the ground that it failed to state a cause of action of which the Federal Court had jurisdiction.

III.

SECTION 43, TITLE 8, U.S.C.A., DOES NOT APPLY TO CROSS-RESPONDENT ELMER E. ROBINSON, AS A PRIVATE CITIZEN NOT ACTING UNDER COLOR OF STATE AUTHORITY.

So far as cross-respondent Elmer E. Robinson is concerned, cross-petitioners are faced with a further legal obstacle to stating a cause of action. By an un-

broken line of case, the Supreme Court has consistently held that, with the exception of purely Federal rights (right to vote in Congressional election, etc.), the power of Congress to pass enabling legislation under the 14th Amendment is limited to limitations upon State action and State officials or agents acting under color of State authority.

Civil Rights cases, 109 U.S. 3, 27 L. ed. 835;
Hodges v. United States, 203 U.S. 1, 51 L. ed. 65;
Butts v. Merchants Co., 230 U.S. 126, 57 L. ed. 1422;
Wheeler v. United States, 254 U.S. 281, 65 L. ed. 270;
Screwes v. United States, 325 U.S. 91, 89 L. ed. 1495;
Powe v. United States, 109 F. (2d) 147;
Love v. Chandler, 124 F. (2d) 785;
Watson v. Oakland Jockey Club, 86 F. (Supp. 1006).

Thus, cross-respondent Elmer E. Robinson, as an individual, could not be civilly sued under a Congressional Act for violating any non-Federal civil rights protected by the 14th Amendment, such as freedom of speech. Cross-petitioner attempts to avoid this problem by asserting that a person not able to commit a crime himself can be liable for conspiracy with others to commit the crime. He cites several cases. These cases merely hold that "A" may be criminally guilty of conspiring with "B" to commit a criminal act, even though "A" could not commit the act him-

self. For example, in the *Downs case,* 3 Fed. (2d) 855, it was held that officers of the law could be convicted of conspiring with two other persons to bribe themselves, even though they could not personally be convicted of the substantive crime of offering themselves a bribe.

In *Picking v. Penna. Ry.,* 151 F. (2d) 240, which is relied on by cross-petitioner, the private individual, Pennsylvania Railroad was dismissed from the case in a later proceeding in the lower court 66 F. Supp. 233 and hence the language of the Circuit Court decision should not be persuasive.

Cross-petitioner also cites *United States v. Trieweiler* 52 F. Supp. 4, for support of this point. However, a reading of the case shows such a proposition to be dicta because all persons connected with the criminal conspiracy to violate civil rights were officers or deputies or members of a legally constituted posse. Thus, all defendants would be acting under color of state authority. In our case it is admitted that cross-respondent Elmer E. Robinson was acting as a private citizen. Furthermore in concluding the opinion the Court in the *Trieweiler* case, said:

> "But where, as here, it is charged that the defendants, as instrumentalities of the state and under color of authority as instrumentalities conspire to deprive a citizen of his constitutional rights, there is a plain averment of facts creating jurisdiction."

The cases that actually support the position of cross-petitioner are criminal cases not in the field of civil rights and they are not applicable in the instant

case, because in each of the cases cited, a conspiracy to commit a particular crime was a separately recognized offense within itself.

Cross-petitioner overlooks one thing. In the cases cited, there was jurisdiction and power to define a crime. In our case, Congress is without constitutional power to legislate civil liability upon private individuals under the 14th and 15th Amendments. It cannot do indirectly what it cannot do directly, and any construction of a Congressional Act beyond the constitutional power to legislate would be as unconstitutional as the bad legislation itself. Furthermore, civil liability under an alleged conspiracy is different than a criminal conspiracy. In the case of a crime, the conspiracy is punished. In the case of civil conspiracy, the gravamen of the action is the civil wrong done. There is no civil liability for a conspiracy as such. The liability is for the actual wrong committed. *Moffett v. Commerce Trust Co.* (supra).

Thus cross-respondent Elmer E. Robinson, if liable at all, would be liable for damages resulting from any of his own acts claimed to have interfered with appellant's civil rights and not the conspiracy. For this reason, appellant cannot avoid the constitutional barrier to the present claim against cross-respondent Elmer E. Robinson as an individual.

Section 43 of Title 8 of USCA (color of authority section), cited by cross-petitioner, cannot be the basis of an action against Elmer E. Robinson, because he was admittedly not acting under color of State authority. Cross-petitioner's only possible claim of jurisdiction over Elmer E. Robinson is

that he would be liable under Section 47 (3d) Title 8 USCA because he conspired with others who acted under color of State authority. However, it has been held that this section applies to equal protection of the laws and not to rights arising under the due process provisions of the 14th Amendment, *McShane v. Moldovan,* 172 F. (2d) 1016 and even if it applied to rights arising under the due process clause of the 14th Amendment, private citizens, would not be subject to liability for the reasons noted above. Furthermore, even if Congress intended to provide for a cause of action against persons not acting under state authority, through the guise of a conspiracy statute, the constitutional bar would prevent such action.

Wherefore, it is submitted that the complaint was properly dismissed on the ground that the Federal Court had no jurisdiction in a civil suit for damages against cross-respondent Elmer E. Robinson, as an individual, not acting under color of authority.

CONCLUSION.

Wherefore cross-petitioner submits that Brandehove's cross-petition for writ of Certiorari be denied for the reasons herein advanced.

Dated, San Francisco, California,
November 15, 1950.

Respectfully submitted,
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Attorneys for Cross-Respondent.